Supreme Court, U.S.
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No. 95-1300

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

LLOYD V. CRAWFORD, III; EDIE CRAWFORD LLOYD; BARBARA CRAWFORD DAVIS,
Petitioners,

v.

JACK A. ROANE; FRED T. GROGAN, JR.; and JERALD M. DUNCAN, Trustees of the Pediatric Allergy Group Employees Retirement Plan and Money Purchase Pension Plan; LOUIS D. HAMRIC, Executor of the Estate of Lloyd V. Crawford, Jr.; BEVERLIE P. CRAWFORD,
Respondents.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For the Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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Counsel for Respondent, Beverlie P. Crawford

REASONS FOR DENYING THE WRIT

I. Petitioners, who do not meet the express requirements for standing set forth in 29 U.S.C. §§ 1002(8) and 1132(a), do not have standing.

II. Respondent, Mrs. Beverlie Crawford, the surviving spouse, is the Plan beneficiary pursuant to the express language of the Plan and the law.

III. Respondent, Mrs. Beverlie Crawford, the surviving spouse, is the Plan beneficiary pursuant to the Plan documents and Summary Plan Description which supply the order of priority of beneficiaries and are not inconsistent.

LIST OF PARTIES TO THIS PROCEEDING AND RULE 28.1 STATEMENT

PETITIONERS:

Lloyd V. Crawford, III; Edie Crawford Lloyd; and Barbara Crawford Davis

RESPONDENTS:

Jack A. Roane, Fred T. Grogan, Jr., and Jerald M. Duncan, Trustees of the Pediatric Allergy Group Employees Retirement Plan and Money Purchase Pension Plan; Louis D. Hamric, Executor of the Estate of Lloyd V. Crawford, Jr.; and Beverlie P. Crawford

Respondent, Mrs. Beverlie Crawford, is an individual, she is not a subsidiary of nor is she affiliated with a publicly-owned corporation. There is no publicly-owned corporation that has a financial interest in the outcome of this appeal.

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The opinion of the United States District Court for the Western District of Tennessee, Western Division, has not been officially reported, but is attached hereto in Appendix A. The opinion of the United States Court of Appeals for the Sixth Circuit has been officially reported, and is attached hereto in Appendix B.

JURISDICTIONAL STATEMENT

This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

There are two statutes involved in the determination of the issues raised in Petitioner's Writ of Certiorari: The Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 et seq. ("ERISA") and the Internal Revenue Code ("IRC"). In particular, 29 U.S.C. § 1002(8) and 29 U.S.C. § 1055(c)(3)(A) are the relevant provisions of ERISA and §§ 401(a) and 417(b) are the relevant provisions of the IRC. Copies of these provisions are attached hereto in Appendix C and D respectively.

STATEMENT OF THE CASE

On November 30, 1992, Petitioners filed a Complaint for Declaratory Judgment in the Chancery Court of Shelby County, Tennessee against

Respondents, the Plan Trustees, the Executor of their Decedent father's estate, and Beverlie Crawford, the surviving spouse of Petitioners' decedent father, seeking to be declared the beneficiaries of their father's money purchase pension plan and employee retirement plan. The case was removed to the United States District Court for the Western District of Tennessee, Western Division, on November 30, 1992, pursuant to 28 U.S.C. § 1441(a) and 29 U.S.C. § 1132(c) on the basis that the Complaint involved federal questions under ERISA. The Answer of Beverlie Crawford was filed on January 11, 1993.

On April 23, 1993, Beverlie Crawford filed a Motion for Summary Judgment and a Memorandum of Law in Support thereof. The Motion for Summary Judgment was supported by the Affidavits of Jack Roane, Fred T. Grogan, Jr. and Jerald M. Duncan, the Plan trustees. Petitioners then filed a Motion for Summary Judgment and supporting Memorandum of Law on May 25, 1993. This Motion was supported by the Affidavit of Petitioner Lloyd V. Crawford, III.

On December 16, 1993, the district court entered an Order Denying Petitioner's Motion for Summary Judgment and Granting Respondents' Motion for Summary Judgment. The district court found that the Plans were "drafted in accordance with the exception to the survivor annuity rules of 26 U.S.C. § 401(a)(11)(B)(iii)" and "under Article IX, ¶ 2, the spouse is the automatic beneficiary of the participant's plan proceeds unless a waiver is executed by the spouse." The Court also found that, in this case, no waiver was executed. Additionally, the district court determined that under the deemed beneficiary

provisions in ¶ 2 of Article IX of the Plans, the surviving spouse is the deemed beneficiary as evidenced by the order of priorities set out in the provision. Accordingly, the district court ordered that "all proceeds from the plans are properly payable to defendant Beverlie Crawford, as decedent's surviving spouse" and "that summary judgment should be entered in favor of defendants [Respondents]." See Appendix A.

On January 14, 1994, Petitioners filed their Notice of Appeal to the Sixth Circuit. By Order of May 11, 1995, the Sixth Circuit found that Petitioners:

> had no right to benefits in the first place under the Retirement Equity Act, which provides that the surviving spouse of a participant is to receive the benefits under an ERISA plan following the death of the participant, unless such benefits are specifically waived by the spouse. 29 U.S.C. § 1055(c)(2)(A)(i). We decline to create an exception to the general rule that a person does not have standing as a 'beneficiary' if he does not have a reasonable or colorable claim to benefits.

See Appendix B.

The court of appeals, despite finding that the Petitioners did not have standing solely because of their status as children of a participant in an ERISA plan, nevertheless addressed the additional issues raised in Petitioners' appeal and upheld the district court's ruling in all respects.

Petitioners filed a Petition for Re-Hearing on May 25, 1995 which was denied without opinion on November 6, 1995.

The decisions of the United States District Court for the Western District of Tennessee and the Sixth Circuit Court of Appeals should be left undisturbed and this Court should deny Petitioners' Writ for Certiorari.

STATEMENT OF FACTS

Lloyd V. Crawford, Jr. (the father of Petitioners and the husband of Respondent, Beverlie Crawford) died on or about March 13, 1992. During his lifetime, Dr. Crawford had been employed by the Pediatric Allergy Group and continued his employment until his retirement on or about December 31, 1991. During his employment, Dr. Crawford participated in the Pediatric Allergy Group Profit Sharing Plan and the Pediatric Allergy Group Money Purchase Pension Plan. During his participation in the Plans, Dr. Crawford did not designate a beneficiary to receive his benefits from the Plans. Further, no waiver of the survivor annuity was executed by Dr. Crawford or by Respondent, Mrs. Beverlie Crawford, Dr. Crawford's surviving spouse.

After Dr. Crawford retired, he began receiving benefits from the Profit Sharing Plan and the Money Purchase Pension Plan on or about January 6, 1992. Because of his untimely death on March 13, 1992, he did not receive the full amount of his benefits from the Plans. Upon his death, and pursuant to the express terms of the Plans, the Internal Revenue Code and the Employee Retirement Income Security Act of 1974, the

Trustees of the Plans awarded Dr. Crawford's remaining benefits to his surviving spouse, Respondent, Mrs. Beverlie Crawford. Petitioners have instituted this action to be declared the beneficiary of Dr. Crawford's Money Purchase Pension Plan.[1]

REASONS FOR DENYING THE WRIT

There is no reason why this Court should grant certiorari in this matter. In fact, none of the considerations governing review on writ of certiorari under Rule 10, Supreme Court Rules, are present. In particular, there is no conflict among circuits with respect to who is a beneficiary under ERISA. This Court resolved that issue in Firestone Tire and Rubber Co. v. Bruch, 489 U.S. 101 (1989). Further, even assuming a conflict among circuits with respect to who is a beneficiary under ERISA, this is not the appropriate case to resolve the conflict since Petitioners, under the express terms of the Plan in question, are simply not entitled to benefits.

More specifically, Respondent, Mrs. Beverlie Crawford, addresses each of the issues raised in Petitioners' Petition and shows this Court that the writ should be denied.

---

[1]In the original action filed by Petitioners, they sought to be declared the beneficiaries of Decedent's Profit Sharing Plan and Money Purchase Pension Plan. However, Petitioners are now only seeking benefits under the Money Purchase Pension Plan.

I. PETITIONERS, WHO DO NOT MEET THE EXPRESS REQUIREMENTS FOR STANDING SET FORTH IN 29 USC §§ 1002(8) AND 1132(a), DO NOT HAVE STANDING

There is no dispute that standing is essential to the exercise of jurisdiction and is a "threshold question. . . [that] determin[es] the power of the court to entertain suit." Warth v. Seldin, 422 U.S. 490 (1975). ERISA's civil enforcement provision, 29 U.S.C. § 1132(a), limits those who can maintain suits under the statute to "participants," "fiduciaries," or "beneficiaries." Petitioners have never claimed to be "participants," or "fiduciaries" as defined by ERISA. 29 U.S.C. §§ 1002(7)&(21). Rather, they seek to establish standing under §§ 1132 or 1002(8) and therefore, they must satisfy the statute's definition of "beneficiary."

ERISA defines "beneficiary" as "a person designated by a participant, or by the terms of any employee benefit plan, who is or may become entitled to a benefit thereunder." 29 U.S.C. § 1002(8). Under this definition, Petitioners are not beneficiaries. The Decedent did not designate Petitioners (his children) as beneficiaries of his Plan. See Coleman v. Champion International, 992 F.2d 530 (5th Cir. 1993).

Petitioners' argument that they could someday become beneficiaries under the Plan is circumspect and has previously been rejected by Courts; the mere possibility that one could potentially have been a beneficiary is insufficient to confer beneficiary status under § 1132. See Coleman, 992 F.2d at 533; Keys v. Eastman Kodak Co., 739 F. Supp. 135 (W.D.N.Y. 1990), aff'd, 923 F.2d 844 (2d Cir. 1990) (son not designated as

beneficiary by father stands no closer to beneficiary status than any other person); Lerra v. Monsanto Co., 521 F. Supp. 1257 (D. Mass. 1981) (surviving spouse lacked standing when plan did not provide for her beneficiary status and deceased did not designate her as such). Just as in Coleman where the court found that the son of the deceased plan participant was not a "beneficiary" and lacked standing to sue under ERISA, Petitioners are not beneficiaries and they lack standing to seek relief under ERISA. Id. at 533.

More importantly, this Court has resolved this issue in Firestone Tire and Rubber Co. v. Bruch, 489 U.S. 101 (1989). In Firestone, this Court was confronted with the issue of who is a "participant" under § 1002(7). In reversing the Third Circuit's ruling that a "participant" is anyone who claims to be one, this Court recognized that to say a "participant" is any person who claims to be one begs the question of who is a "participant" and renders the definition set forth in § 1002(7) superfluous. Id. 117-18.

Although the Court's analysis concerned the definition of "participant" under § 1002(7), the analysis applies with equal force to the definition of "beneficiary" under § 1002(8) because the operative language of each section is virtually identical.

Therefore, based on statutory language and the interpretations given by this Court, a "beneficiary" is not anyone who claims to be one. Rather, a "beneficiary" under § 1002(8) is one who has a reasonable or colorable claim to benefits. In this instance, just as the district court and court of appeals found, the language of the Plan compels the conclusion that Petitioners do

not have a reasonable claim for benefits from their father's Plan and therefore, are not proper parties to request adjudication of the issues of whether the Trustees wrongly distributed benefits to Mrs. Crawford.

Petitioners' claim that the Sixth Circuit has not followed its own decision in Swinney v. General Motors Corp., 46 F.3d 512 (6th Cir. 1995) is without merit. In fact, the Sixth Circuit meticulously explained why Swinney was not applicable to the case at bar. The most important reason cited by the Sixth Circuit was that it would be impossible "to dupe" Dr. Crawford into not naming his children (Petitioners) as beneficiaries under the Plan, when under the Retirement Equity Act, Petitioners had no rights to benefits in the first place. Mrs. Crawford controlled the benefits under the Plan since she would have had to waive them for any other designation to be valid. See 29 USC § 1055(c)(2)(A)(i).

Based upon the foregoing, Petitioners do not have standing in this action.

II. RESPONDENT, MRS. BEVERLIE CRAWFORD, THE SURVIVING SPOUSE, IS THE PLAN BENEFICIARY PURSUANT TO THE EXPRESS LANGUAGE OF THE PLAN AND THE LAW

A. The Trustees are properly providing benefits to the surviving spouse in the form of a QJSA.

The Money Purchase Pension Plan is a qualified, tax exempt plan under 26 U.S.C. § 401 (1986) and 26 U.S.C. § 501(a) (1986). The Plan received Internal Revenue Service ("IRS") approval as a qualified plan as evidenced by a favorable determination letter dated April 4, 1986, with such letter being issued after a review of the Plan by the IRS.

As a qualified plan, the Plan is required by the Retirement Equity Act of 1984 ("REA") to provide a Qualified Joint and Survivor Annuity ("QJSA") for the surviving spouse of a participant. 26 U.S.C. § 401(a)(11) (1986). A QJSA is an annuity which is purchasable with the participant's account balance and which is payable for the life of the participant with a survivor annuity for the life of the participant's spouse equal to at least 50% of the amount of the annuity payable during the joint lives of the participant and his spouse. IRC § 417(b). The Money Purchase Pension Plan (Appendix E) declares on its first page that it was intended that the Plan "comply with all provisions of the Internal Revenue Code and IRS Regulations and Rulings in order to continue to be a 'Qualified Plan'". The Plan provides for a survivor annuity through the

deemed beneficiary language which provides for payment of the entire death benefit to the spouse in the event no beneficiary is designated. This is set forth in Article IX, paragraph 4, entitled "Annuity Distributions to Married and Unmarried Participants", as required by 26 U.S.C. § 401(a)(11) (1986). The first paragraph of this section states as follows:

> For plan years beginning after December 31, 1984, the Committee shall direct the Trustee to distribute a married or unmarried Participant's Nonforfeitable Accrued Benefit in the form of a qualified joint and survivor annuity, unless the Participant makes a valid waiver election (described in paragraph 5) within the 90 day period ending on the date the Trustee will commence benefits (the 'annuity starting date').

As required by 26 U.S.C. § 401(a)(11), the Plan provision set forth above clearly requires a waiver by the participant in order for a beneficiary other than the surviving spouse to receive benefits. Furthermore, the surviving spouse must also consent to such a waiver. 26 U.S.C §§ 417(a)(1)(A)(i) and 417 (a)(6)(A). Article IX, paragraph 5, entitled "Waiver Election - Qualified Joint and Survivor Annuity", states as follows:

> A married participant's waiver election is not valid after December 31, 1984 unless:

A. The Participant's spouse (to whom the survivor annuity is payable under the Qualified Joint and Survivor Annuity) has consented in writing to the waiver election, the spouse's consent acknowledges the effect of the election, and a notary public or the Committee (or its representative) witnesses the spouse's consent, and

B. Unless the spouse is the Participant's sole primary Beneficiary, the spouse consents to the Participant's Beneficiary designation or to any change in the Participant's Beneficiary designation. The spouse's consent to a waiver of the Qualified Joint and Survivor Annuity shall be irrevocable unless the Participant revokes the waiver election.

Thus, both a participant and a participant's spouse must consent in writing to the waiver election. The spouse's consent, as required by 26 U.S.C. §§ 417(a)(1)(A)(i) and 417(a)(6)(A) (1986), must acknowledge the effect of the election, be notarized or witnessed by the Committee, and be obtained during the 90 day period before payments are scheduled to begin.

Decedent retired on or about December 31, 1991. Pursuant to the express provisions of the Plan, annuity distributions from the Plan began on or about January 6, 1992, and continued on a monthly basis until his death in March of 1992. After Decedent's death, his surviving spouse, Mrs. Beverlie Crawford, continued to receive these monthly payments in the form of a

survivor annuity, a QJSA. A waiver of the survivor annuity was not executed by Decedent, nor was it consented to by his spouse, Mrs. Beverlie Crawford, within the 90 day period ending on the day before the distributions to Decedent were to begin. Thus, benefits were being distributed as required by the Plan, the IRC and ERISA, and Mrs. Beverlie Crawford has continued to receive the survivor annuity required under Article IX and the law.

Under the terms of the Plan, Mrs. Beverlie Crawford, the surviving spouse, is the sole beneficiary of the funds in Decedent's account. Payment to any other individual without Mrs. Beverlie Crawford's consent would violate both the terms of the Plan and the law. See 26 U.S.C. §§ 417(a)(1)(A)(i) and 417 (a)(6)(A). If payment was made to anyone else, the Plan could lose its tax exempt status and damage Pediatric Allergy Group and the other employees who participate in the Plan. See e.g. Martin Fireproofing Profit Sharing Plan & Trust v. Commissioner, 92 T.C. 1197 (1989).

Respondent, Mrs. Beverlie Crawford, the surviving spouse, is the only Plan beneficiary of the Plan benefits under any reasonable interpretation of the Plan and the law. Any supposed substantive right alleged to have been created in Petitioners would have been overridden by the express terms of the Plan and the clear legislative statement giving the surviving spouse the superior claim.

B. Under the Plan, Benefits Must be Paid in the Form of a QJSA.

Petitioners' claim that the Plan benefits should be paid in the form of a Qualified Pre-retirement Survivor Annuity ("QPSA") is without merit. The surviving spouse must receive a QPSA only if a vested plan participant, who has a spouse, is not alive on the annuity starting date. IRC § 401(a)(11)(A)(ii). A QPSA is an annuity for the life of the surviving spouse having a value of not less than one-half the Participant's nonforfeitable account balance under the Plan, determined at the date of death. 29 U.S.C § 1055(e). If a vested participant who has a spouse is alive on the annuity starting date, the benefits must be payable as a QJSA. IRC § 401(a)(11)(A)(i). There is no question that the Decedent, a vested plan participant, was alive on the annuity starting date. Additionally, there is no question that Decedent had a spouse and that his spouse was Respondent, Mrs. Beverlie Crawford. Therefore, benefits are payable as a QJSA and not a QPSA. See IRC § 401(a)(11)(A)(i).

Pursuant to IRC § 417(a)(f)(2) the "annuity starting date" is: (i) the first day of the first period for which an amount is paid as an annuity, or (ii) in the case of a benefit not payable in the form of an annuity, the first day on which all events have occurred which entitle the participant to such benefit.

The Decedent retired on or about December 31, 1991. He began receiving benefits from the Plan on or about January 6, 1992. Notwithstanding the fact that IRC § 417(a)(f)(2) clearly defines the annuity starting date, Petitioners seek to magically transform the annuity

starting date to a date after Decedent's death by claiming that the decedent did not receive an explanation of the QJSA and suggesting that an explanation of the QJSA must be given and is a "pre-requisite to the occurrence of the annuity start date." Even assuming a failure of the Trustees to provide written explanation of the QJSA to decedent, the annuity starting date remains January 6, 1992 when decedent was alive. Failure to provide written explanation of the QJSA does not change the written terms of the Plan. The written terms of the Plan continue to be effective as an obligation of the employer sponsoring the plan and ensuring that the described benefits will be provided. Petitioners' argument also assumes that if a QJSA explanation had been give, the Crawfords would have waived the QJSA in favor of some other form of benefits. However, if they received the explanation of QJSA and did nothing, they would be in the same position Mrs. Crawford is in now.

In order to change the annuity starting date to make the benefits payable as a QPSA versus a QJSA, the starting date would have to be moved over three months to a date after the Decedent's death, March 13, 1992. To move the annuity starting date as desired by Petitioners ignores the clear language of IRC § 417(a)(f)(2), the express language of the Plan and the fact that the Decedent had already begun receiving benefits under the Plan.

Even if Petitioners' contention that Plan benefits are payable as a QPSA, was valid, Petitioners' argument that they are entitled to benefits under the Plan if the benefits are paid pursuant to a QPSA has no merit. Petitioners argue that if benefits are paid as a QPSA,

then a beneficiary designation naming someone other than the surviving spouse as a death beneficiary is valid with respect to fifty percent (50%) of the Participant's account balance. However, the Decedent made no such designation. No amount of maneuvering by Petitioners can change the fact that they were not designated as beneficiaries of the Plan by Decedent, nor are they entitled to any Plan benefits.

Benefits under the Plan are payable and being paid to Respondent, Mrs. Beverlie Crawford, the surviving spouse, as a QJSA. Any suggestion that the "annuity starting date" should be moved to after the date of the Decedent's death in order to make benefits payable to the Decedent's surviving spouse in the form of a QPSA has no validity. Additionally, regardless of how benefits are paid, whether as a QPSA or QJSA, the benefits are not payable to anyone other than Respondent, Mrs. Beverlie Crawford under the express language of the Plan since no beneficiary designation was made by Decedent and no waiver of benefits was made by his spouse, Mrs. Beverlie Crawford.

III. RESPONDENT, MRS. BEVERLIE CRAWFORD, THE SURVIVING SPOUSE, IS THE PLAN BENEFICIARY PURSUANT TO THE PLAN DOCUMENTS AND SUMMARY PLAN DESCRIPTION WHICH SUPPLY THE ORDER OF PRIORITY OF BENEFICIARIES AND ARE NOT INCONSISTENT

Article IX, paragraph 2 of the Plan allows a participant the unrestricted right to designate a beneficiary, except that the participant's spouse must

consent to the beneficiary designation if it is to someone other than the spouse. If a participant fails to name a beneficiary or if the beneficiary named by the participant predeceases him, then the Trustee shall pay the participant's entire accrued benefit in accordance with the method of payment specified in Article IX, Time and Method of Payment of Benefits, to the following Deemed Beneficiaries.

(a) the participant's surviving spouse;

(b) the participant's surviving children;

(c) the legal representative of the estate of the last to die of the participant and his beneficiary.

The Plan language clearly supplies an order of priority in that the deemed beneficiaries are numerically listed. To pay the benefits in equal portions to the deemed beneficiaries listed in (a), (b) and (c) would be unworkable. In addition, the following sentence of the Plan requires payment of the remaining benefits to the estate of the initial beneficiaries and not to the successive beneficiaries on the list in the event of the death of the beneficiary:

> In the event the participant's beneficiary or one of the above-deemed beneficiaries of subparagraphs (a), (b) or (c) dies before complete distribution of the participant's accrued benefits, such remaining accrued benefits shall be paid to such initial beneficiary's (or

beneficiaries') estate instead of being paid successively to the other deemed beneficiaries listed above.

The IRS considered a similar deemed beneficiary provision in a letter ruling 9008003 (November 13, 1989). The ruling represents the IRS' interpretation of similar facts and applicable law. In this letter the participant had designated his children as beneficiaries prior to the REA requirement of survivor annuities. He later remarried and died after the REA survivor annuity requirements became effective in the Plan. Before the participant's death, the surviving spouse had not consented to the designation of the children as beneficiaries. Thus, the designation was invalid. Under identical deemed beneficiary provisions, the IRS interpreted the deemed beneficiary provisions to "mean that the surviving spouse is the only deemed beneficiary as distinguished from the class of deemed beneficiaries consisting of the surviving spouse and the three children." Petitioners suggest that the district court erred in "relying upon letter ruling 9008003 in rendering its decision." However, even a cursory review of the district court's decision reveals that the letter ruling was not "relied upon," but was merely used as an illustration with respect to the interpretation of similar "deemed beneficiary" language in a Plan.

Further, if Petitioners' interpretation of the Plan is correct, one-third of the benefits would be paid to the surviving spouse, Mrs. Beverlie Crawford, one-third to Petitioners and one-third to Petitioners and the estate of Mrs. Beverlie Crawford (since they have all survived the participant). This interpretation of the language of the Plan makes no sense. Obviously, it was the Plan's intent

to provide for successive beneficiaries, i.e., the benefits would be paid to the surviving spouse and if no surviving spouse existed, then to the participant's surviving children and if no surviving children existed, then to the estate of the "last to die of the participant and his beneficiary." If benefits are paid pursuant to Petitioners' interpretation of the Plan language, the surviving spouse would not receive her required 50% of the participant's account balance, whether paid as a QJSA or QPSA. See 29 U.S.C. § 1055(d); IRC § 417(b).

Petitioners' contention that the Plan documents are inconsistent with respect to the determination of beneficiaries is unfounded. Petitioners point to no inconsistencies between the Summary Plan Description and the Plan documents. In fact, just as the Sixth Circuit found, the Plan documents are consistent and clear with respect to the determination of beneficiaries and that Respondent, Mrs. Beverlie Crawford, as surviving spouse, is entitled to Decedent's Plan benefits.

CONCLUSION

The issues raised in this case do not warrant review by this Court. The Petition does not present any grounds for granting Certiorari under Rule 10 of the Rules of this Court, and should be denied.

Respectfully submitted,

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